No. 76-587

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In the Supreme Court of the United States

OCTOBER TERM, 1976

WILLIAM GIBBONS, TRUSTEE OF THE PROPERTY OF CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, DEBTOR, PETITIONER

v.

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the trustee of a railroad in reorganization—who is empowered, under Section 77(c)(2) of the Bankruptcy Act, to operate the railroad's business "subject to * * * the jurisdiction of the [Interstate Commerce] Commission"—must comply with the Commission's car service regulations governing the settlement of pre-reorganization interline per diem accounts.[1]

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[1]The petition for a writ of certiorari also presents the question whether the reorganization court in this case properly limited the trustee, in his collection of other interline accounts, to collecting the outstanding net balance in the debtor's favor. The Commission took no position on that question in the courts below and does not address it here.

STATEMENT

In March 1975, the Chicago, Rock Island and Pacific Railroad Company filed in the United States District Court for the Northern District of Illinois a petition for reorganization under Section 77 of the Bankruptcy Act, 47 Stat. 1474, 11 U.S.C. 205. The district court appointed petitioner William Gibbons as trustee, and the Interstate Commerce Commission thereafter approved the appointment (Pet. App. A10-A11). Under Section 77, the trustee is empowered to operate the bankrupt railroad—subject to the supervision of the reorganization court and the jurisdiction of the Interstate Commerce Commission—pending the adoption of an acceptable reorganization plan.

The question in this case is whether the trustee is required to comply with one aspect of the Commission's car service regulations governing when and in what manner railroads must pay interline per diem accounts—that is, charges for the use of another railroad's cars.

Under Section 1(14) of the Interstate Commerce Act, 24 Stat. 379, as amended, 49 U.S.C. 1(4)—which requires rail carriers to establish reasonable "through routes" with other carriers—a railroad must allow its cars to be carried beyond its own lines. See *United States* v. *Pennsylvania R. Co.*, 323 U.S. 612, 615; *Chicago, Rock Island and Pac. Ry. Co.* v. *United States*, 284 U.S. 80, 91, 101-102. The result is that "[t]he freight cars of the Nation [are] in essence a single common pool, used by all roads." *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 743.

Sections 1(10) through 1(17) of the Act give the Commission comprehensive authority to regulate all aspects of car service.[2] In accordance with that authority, the

[2]Car service refers to "the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to [Part I of the Act]." 49 U.S.C. 1(10).

Commission has established mandatory rules, uniformly applicable to all interlining railroads, governing per diem charges and the settlement of per diem interline accounts.[3]

In the present case, the reorganization court entered an order authorizing the trustee, in his discretion, to pay or defer payment of the Rock Island's "pre-reorganization" per diem accounts—"accounts presented for payment during the reorganization period for car use before the reorganization petition was filed" (Pet. App. A13). The trustee declined to pay per diem charges for car use during the period January through March 1975.

Twenty-three interline railroads which, like the Commission, had intervened in the reorganization proceeding (and are respondents here) petitioned the district court to order the trustee to pay the Rock Island's pre-reorganization per diem balances. The district court denied the petition (Pet. App. A1-A9).[4] While acknowledging that it was "powerless to order the Debtor and Petitioners to disregard

[3]Under those rules, as the court of appeals stated, "[p]er diem charges include a 'basic per diem' rate paid by the car-user to the car-owner to compensate the car-owning railroad for the average cost of purchasing and maintaining its cars" and "an 'incentive per diem' charge which operates to encourage the prompt return of equipment found to be in short supply" (Pet. App. A12; footnotes omitted). See *Chicago, B. & O. R. Co.* v. *New York, S. & W. R. Co.*, 332 I.C.C. 176, affirmed *sub nom. Union Pacific R. Co.* v. *United States*, 300 F. Supp. 318 (D. Neb.), and *Boston & Maine R.R.* v. *United States*, 297 F. Supp. 615 (D. Mass), affirmed *per curiam*, 396 U.S. 27; *Incentive Per Diem Charges—1968*, 337 I.C.C. 183 and 217, affirmed *sub nom. United States* v. *Florida East Coast Ry. Co.*, 410 U.S. 224, and 417 U.S. 901. The Commission recently refused to exempt bankrupt and marginal railroads from the obligation to pay incentive per diem charges. *Incentive Per Diem Charges—1968*, 349 I.C.C. 303, 326-330.

[4]The district court also granted a petition by the interline railroads to instruct the trustee to collect other pre-reorganization interline accounts only to the extent of a net balance in the debtor's favor (Pet. App. A5-A9). See note 1, *supra*.

the rules of the Commission with respect to the creation of debts arising out of car hire," the court held that it was empowered to "determine the priorities among those debts created in accordance with the regulations of the Commission along with those other debts incurred by the Debtor prior to the filing of its Petition in bankruptcy" (Pet. App. A3-A4). The court concluded that it could properly leave to the trustee's discretion the payment or deferral of the pre-reorganization per diem accounts, and it declined to order the trustee to make the requested payments (Pet. App. A4, A5).

The court of appeals reversed (Pet. App. A10-A26).[5] It held that, "in view of the comprehensive regulation by the Commission of all aspects of car service and the key role which rules for settlement of per diem accounts play in that regulatory system, the payment of per diem accounts for both post- and pre-reorganization periods is properly considered as part of the operation of the railroad in reorganization under Section 77(c)(2) and is consequently governed by Commission orders" (Pet. App. A17). The court of appeals "recognize[d] that the pre-reorganization per diem accounts do represent a claim against the debtor's estate and in that sense constitute a 'debt' within the meaning of the Bankruptcy Act" (*ibid.*). It concluded, however, that "the reorganization court's power in determining the priority of that claim in relation to claims of other creditors has been circumscribed by the superseding authority of the Commission in this area" (*ibid.*).

ARGUMENT

The decision of the court of appeals is correct, and further review is not warranted.

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[5]The court of appeals affirmed the aspect of the district court's order relating to the collection of other interline accounts (Pet. App. A21-A26).

1. Petitioner's argument, in essence, is that the Rock Island's pre-reorganization per diem obligations are "debts," the priority of which, in relation to other debts, is subject to the exclusive determination of the reorganization court. It is upon this premise that petitioner rests his contentions (1) that the court of appeals' decision improperly allows the Commission to give special priority to per diem claims (Pet. 6-10), (2) that the decision below conflicts with the "six months rule" governing preferences and priorities to certain unsecured creditors (Pet. 10-12), and (3) that the decision deprives him of property without due process of law (Pet. 14-16).

Like the court of appeals, we recognize that per diem obligations have some of the characteristics of a debt. But unlike simple "debt," the per diem account is a regulatory device crucial to the Commission's effective supervision of the national car fleet.

Section 77(c)(2) of the Bankruptcy Act, 11 U.S.C. 205(c)(2), gives the trustee of a railroad in reorganization the power to operate the railroad "subject to the control of the judge *and the jurisdiction of the Commission*" (emphasis added). Section 1(17)(a) of the Interstate Commerce Act, 49 U.S.C. 1(17)(a), specifically requires rail carriers and their operating trustees to comply with the Commission's car service orders. The court of appeals correctly concluded, in light of these provisions, that the trustee must comply with the Commission's mandatory rules governing the settlement of per diem accounts, even with respect to obligations based upon pre-reorganization car use. "Since Commission orders prescribe the *time* and *manner* of payment, the trustee is in *current* violation of Commission orders governing all operating railroads when he refuses to pay per diem accounts which become due during the reorganization period" (Pet. App. A18-A19; emphasis in original).

To excuse the trustee from the uniform obligation to settle per diem accounts would disrupt the Commission's finely tuned regulatory scheme, designed to alleviate the critical national car shortage. See *United States* v. *Florida East Coast R. Co., supra,* 410 U.S. at 230. As the court of appeals correctly stated (Pet. App. A19):

> [B]y avoiding payment of pre-reorganization per diem accounts under the Commission's uniform accounting rules, railroads in reorganization could undermine attempts to increase supply and improve allocation of the national rail car fleet. Other railroads, many of which are themselves financially troubled, would be forced in effect to subsidize the bankrupt lines for their pre-reorganization car use. Since basic per diem rates cover only an average cost of car ownership, nonpayment by bankrupt roads would result in a failure to compensate car-owning roads for the full costs of car ownership. This would tend to discourage rather than encourage car ownership and would consequently thwart recent Congressionally mandated attempts to increase car supply.

Section 77 of the Bankruptcy Act, as the court of appeals concluded, "is designed to effect reorganization without undermining or disrupting administrative regulation of the national rail system" (Pet. App. A20).

2. Petitioner's contention (Pet. 12-13) that the decision below conflicts with *In re Penn Central Transportation Co.*, 486 F. 2d 519 (C.A. 3), certiorari denied *sub nom. Chicago & North Western Transportation Co.* v. *Baker,* 415 U.S. 990, is correctly answered in the opinion of the court of appeals (Pet. App. A20-A21). Although the Third Circuit held that the reorganization court could properly authorize the trustee to defer payment of certain pre-reorganization interline accounts (including per diem accounts), the decision rested on "traditional common law trust

principles" (486 F. 2d at 524). "[N]o attempt was made in [*Penn Central*] to distinguish the per diem account from other interline accounts," and "the argument urged before [the court below] was not similarly presented in those proceedings" (Pet. App. A20).[6]

Indeed, the Third Circuit's decision was grounded in part on that court's belief that, "[d]espite the legal obligation to perform the services, there is no compulsion, statutory or otherwise, as to the manner by which the services shall be paid. Arrangements for payment or credit are voluntary" (486 F. 2d at 528). With respect to per diem accounts, however, the Commission has in fact established mandatory rules governing the manner of payment. *Rules for Car-Hire Settlement,* 160 I.C.C. 369, 165 I.C.C. 495, sustained in all material respects in *Chicago, Rock Island and Pac. Ry. Co.* v. *United States,* 284 U.S. 80.

The court below thus correctly concluded that neither its reasoning nor its result was inconsistent with that of the Third Circuit in *Penn Central.* "It is conceded in this case that trust principles do not require immediate payment of the pre-reorganization per diem accounts" (Pet. App. A20-A21). The holding of the court below that Commission regulations *do* require such payment creates no conflict requiring resolution by this Court, because the Third Circuit did not consider that issue in its *Penn Central* decision.[7]

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[6]The Commission was not a party to the *Penn Central* case.

[7]The issue is now pending before the Third Circuit in another set of appeals in the *Penn Central* litigation. *In the Matter of Penn Central Transportation Company,* Nos. 76-1862, *et al.* The cases have been briefed but oral argument has not yet been held.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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